MADLIS AZID v. BOARD OF OFFICERS & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ RAHIM JCA
ROHANA YUSUF JCA
ABANG ISKANDAR JCA
[CIVIL APPEAL NO: S-01-294-07-2012]
30 OCTOBER 2014

NATIVE LAW AND CUSTOM: *Land dispute – Dealings of native titles – Third respondent relied on Native Certificate for entitlement to native lands – Appellant applied to review Native Certificate under s. 3(3) Interpretation (Definition of Native) Ordinance (Sabah Cap 64) – Locus standi – Whether appellant had locus standi to make application for review of declaration made by Native Court – Whether appellant had real and genuine interest in subject matter – Whether Board of Officers had jurisdiction to entertain application for review*

STATUTORY INTERPRETATION: *Construction of statutes – Intention of Parliament – Section 3(3) Interpretation (Definition of Native) Ordinance (Sabah Cap 64) – Review and scrutiny of exercise of declaration made before Native Court – Whether confined to applicant or an aggrieved person – "any declaration" – Whether choice of such phrase opened door for third parties to be heard regarding grievances arising out of declaration – Whether Board of Officers had jurisdiction to entertain application for review of Native Certificate*

CIVIL PROCEDURE: *Judicial review – Application for – Board of Officers' decision not to review status of Native Certificate issued to third respondent – Whether s. 3(3) Interpretation (Definition of Native) Ordinance (Sabah Cap 64) contained specific provisions for challenge by third party before or after declaration of native status – Whether parties with interest could intervene in application proceeding for native status – Locus standi – Whether appellant had locus standi to make application for review – Whether appellant had real and genuine interest in subject matter – Whether Board of Officers had jurisdiction to entertain application for review under s. 3(3) Interpretation (Definition of Native) Ordinance (Sabah Cap 64)*

The appellant and 97 others had sued the third respondent in respect of a dispute as to the ownership of various parcels of native title land totalling 395.62 acres at Sungai Sugut, Labuk, Sabah (native lands). The legal basis of the suit was grounded on misrepresentation, *non-est factum* and inequality of bargaining power. During the trial of that suit, the third respondent had relied on his Native Certificate (which declared that he is a native) to entitle him to own the native lands. The appellant referred to the first respondent, the Board of Officers, his complaint to have the Native Certificate issued to and held by the third respondent reviewed under s. 3(3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap. 64) ('the Ordinance'). The gist of the complaint was that the said Native Certificate was either forged or did not exist at all. The appellant cited correspondences from various public and

A private sources purportedly stating that the Native Certificate in the possession of the third respondent did not exist as it was never issued by the relevant Native Court, namely, the Native Court of Beluran. The first respondent rejected the application by the appellant to review the status of the Native Certificate issued to the third respondent. The appellant thus B applied for judicial review against the first respondent's decision. In the judicial review proceedings before the High Court, the appellant submitted that to construe s. 3(3) of the Ordinance narrowly by limiting the class of people who are entitled to seek review of the Native Certificate to only applicants for Native Certificate was irrational on the ground of '*Wednesbury* C unreasonableness'. The appellant further argued that to sustain the first respondent's construction of s. 3(3) of the Ordinance would deny the appellant's right of access to justice, infringing art. 8 of the Federal Constitution. The High Court Judge, in dismissing the appellant's application, held that the Ordinance does not contain any specific provision for challenge by third party before or after the declaration of the native status D and disagreed with the appellant's suggestion that the court must read into s. 3(3) of the Ordinance to allow strangers or third party with interest to intervene in the application proceeding for native status. Hence, the appellant appealed. The issues that arose were (i) whether the appellant had the *locus standi* under s. 3(3) of the Ordinance to make the application to the first E respondent to review a declaration made by the a Native Court in exercising its powers under the Native Courts Enactment 1992 (in particular s. 16) on the native status of a third party when the appellant was not a party to the application for the declaration of the native status of that third party pursuant to s. 3(3) of the Ordinance before the Native Court and (ii) whether the first F respondent had the jurisdiction to entertain such application for review under s. 3(3) of the same Ordinance.

Held (allowing appeal with costs)
Per Abdul Aziz Rahim JCA (for the majority):

G **(1)** First and foremost, the court must apply the basic principle as to the construction of statute that is to give the words of a statute their plain and ordinary meaning with the view of promoting the purpose of the statute as envisaged under s. 17A of the Interpretation Acts 1948 and 1967. From the reading of the long title of the Ordinance, the Ordinance was made for the purpose of providing a more precise definition of the H expression 'native' under any written law applicable to the State of Sabah in force at the commencement of the Ordinance or any written law coming to force under the commencement of this Ordinance. If the expression 'native' appears in any written law in force at the commencement or that comes into force after the commencement of the I Ordinance, then in order to ascertain whether a person claiming to be a native is in fact a native of Sabah, resort must be made to the provisions of the Ordinance in particular ss. 2 and 3. (paras 29 & 33)

(2) It was incorrect to say that s. 3(1), (2) and (3) of the Ordinance are interrelated in such a manner that it can be termed as 'nesting provisions' because the earlier provisions were made subject to later provisions. The subsections are interrelated, no doubt; however, the qualifier 'subject to the provision of sub-s. (3) of this section, ...' in sub-s. (2) only relates to sub-s. (3) in respect of the exclusivity of the jurisdiction of a Native Court to entertain and determine at the application for a declaration as to the native status of an applicant. By this qualifier, the exclusive jurisdiction of a Native Court in respect of such application does not mean finality in its determination. Subsection (3) provides that the exercise of the jurisdiction is '... subject to review and scrutiny by, and appeal to the District Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri for the purpose'. (para 34)

(3) The wording of sub-s. 3(3) of the Ordinance starts with the expression 'Any declaration of any Native Court ...'. There is no qualifier in sub-s. (3). The subsection does not confine itself to the applicant or an aggrieved party before the Native Court or the Board of Officers before a review and scrutiny can be done by the District Officer or a Board of Officers. In the subsection, after the expression 'subject to review and scrutiny by' there is a comma then followed by the expression 'an appeal to'. This showed that the review and the scrutiny of the exercise of any declaration can be made either at the instant of the District Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri for the purpose on its own volition or on an application or at the instant of any interested party. (para 35)

(4) Section 3(3) of the Ordinance uses the expression 'any declaration' as a general expression. This phrase imports a wide meaning. If what was meant that it only concerned the aggrieved applicant, then it would have been couched as 'any declaration adverse to the applicant' because that would probably be the only situation where a declaration made by the first respondent may be challenged. But, by employing the phrase as it did, *to wit* 'any declaration', that must include, any declaration which may not be adverse against the applicant but it may be adverse to the third parties who may not be parties in the application, but who may however have interest in the status of the applicant declared as a native. The choice of such phrase has opened the door for third parties, such as the appellants here, to be allowed in and be heard about their grievances arising out of the declaration of the third respondent as native of Sabah. (paras 36-38)

(5) The reasoning by the first respondent, in rejecting the appellant's application on the ground that it had no power to hear the application because it had read the phrase 'Any person claiming to be a native ...' in s. 3(1) of the Ordinance together with s. 3(3) of the same Ordinance

A and conclude that the person who is the subject of a revision or scrutiny under s. 3(3) must necessarily be the person claiming to be a native under sub-s. (1) was flawed. There is nothing in s. 3(1) and s. 3(3) of the Ordinance that warrants such reading of the two provisions. An unsuccessful applicant under sub-s. (1) would, in all circumstances, be
B able to appeal to a District Officer or Board of Officers against the refusal of a Native Court to grant the declaration instead of relying on the power of review or revision or scrutiny of the District Officer or the Board of Officers. (para 39)

(6) Applying the principle as to the test to be applied in respect of the issue
C as to *locus standi* as propounded by the Federal Court in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor*, on the factual matrix of the appellant's complaint in the High Court and his letters to the first respondent, the appellant had a real and genuine interest in the subject matter *to wit* the declaration as to the native status
D of the third respondent. (para 42)

Per Rohana Yusuf JCA (dissenting):

(1) The scheme and structure of s. 3 of the Ordinance as a whole, in its plain and ordinary meaning and language, cannot cause s. 3(3) to be expanded
E to include any person other than the applicant himself. The language of the provision itself read 'any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by sub-s. (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of Officers appointed by the Yang Di Pertua Negeri for the purpose'. The only person who can be aggrieved by the decision of the
F Native Court pursuant to s. 3(1) would be the applicant. It is inconceivable to say that any other person would be aggrieved by the decision of the Native Court in the scheme of s. 3. Thus, a third person like the appellant herein could not invoke s. 3(3) simply because the decision under s. 3(2) did not affect him in any way whatsoever. (para
G 56)

(2) There is no room for a third person to lodge an appeal under s. 3(3) against the decision made by the Native Court. That right is only opened to the applicant before the Native Court under s. 3(1) which surely would have been the third respondent in the context of the present
H appeal. The court could not read into this provision by adding into it, any other person than the applicant. This, the court could not add, when the legislator did not intend to add. It is not for the court to read into the law what is not intended by Legislature. (para 58)

I **(3)** The interpretation of s. 3(3) must be construed in its plain and ordinary meaning and it must not be confused with the test of 'adversely affected person'. The word 'adversely affected person' is not mentioned in s. 3(3). Thus, the test 'adversely affected person' to determine *locus* for

a judicial review did not apply. The first respondent had correctly interpreted s. 3(3) of the Ordinance. The decision of the first respondent was therefore not irrational or suffered from *Wednesbury* unreasonableness. There was no good reason for the decision of the first respondent to be impugned. (para 52)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan 97 orang lain telah menyaman responden ketiga berkenaan satu pertikaian berhubungan dengan pemilikan pelbagai bidang tanah anak negeri berjumlah 395.62 ekar di Sungai Sugut, Labuk, Sabah ('tanah anak negeri'). Asas undang-undang guaman itu adalah berlandaskan misrepresentasi, *non-est factum* dan ketidaksamaan kuasa tawar-menawar. Semasa perbicaraan guaman itu, responden ketiga telah bergantung kepada Sijil Anak Negeri (yang mengisytiharkan bahawa dia adalah seorang anak negeri) untuk memberi hak kepadanya memiliki tanah anak negeri. Perayu telah merujuk kepada responden pertama, Lembaga Pegawai ('Lembaga'), aduannya supaya Sijil Anak Negeri yang dikeluarkan dan dipegang oleh responden ketiga disemak semula di bawah s. 3(3) Ordinan Tafsiran (Takrif Anak Negeri) (Sabah Bab 64) ('Ordinan'). Dasar aduan adalah bahawa Sijil Anak Negeri adalah palsu atau tidak wujud sama sekali. Perayu telah memetik surat-menyurat daripada pelbagai sumber awam dan persendirian yang kononnya menyatakan bahawa Sijil Anak Negeri yang berada dalam milik responden ketiga tidak wujud kerana ia tidak dikeluarkan oleh Mahkamah Anak Negeri yang relevan, iaitu, Mahkamah Anak Negeri Beluran. Responden pertama telah menolak permohonan perayu untuk mengkaji semula status Sijil Anak Negeri yang telah dikeluarkan kepada responden ketiga. Perayu oleh itu memohon untuk semakan kehakiman terhadap keputusan responden pertama. Dalam prosiding semakan kehakiman di hadapan Mahkamah Tinggi, perayu menghujahkan bahawa untuk mentafsir s. 3(3) Ordinan dengan membataskan orang yang berhak untuk menuntut semakan Sijil Anak Negeri hanya kepada pemohon-pemohon Sijil Anak Negeri adalah tidak waras atas alasan '*Wednesbury* unreasonableness'. Perayu selanjutnya menghujahkan bahawa untuk mengekalkan tafsiran responden pertama berkenaan s. 3(3) Ordinan akan menafikan hak perayu untuk mendapatkan keadilan, dengan itu melanggar per. 8 Persekutuan Perlembagaan. Hakim Mahkamah Tinggi, dalam menolak permohonan perayu, memutuskan bahawa Ordinan tidak mengandungi peruntukan-peruntukan spesifik bagi bantahan daripada pihak ketiga sebelum atau selepas pengisytiharan status anak negeri dan tidak bersetuju dengan cadangan perayu bahawa mahkamah harus mentafsir s. 3(3) Ordinan supaya membenarkan orang yang tidak terlibat atau pihak ketiga untuk campur tangan dalam prosiding permohonan untuk status anak negeri. Oleh itu, perayu merayu. Isu-isu yang timbul adalah (i) sama ada perayu mempunyai *locus standi* di bawah s. 3(3) Ordinan untuk membuat permohonan kepada responden pertama untuk membuat semakan ke atas pengisytiharan yang dibuat oleh Mahkamah Anak Negeri dalam melaksanakan kuasanya di bawah Enakmen Mahkamah Anak Negeri

A 1992 (khususnya s. 16) berkenaan status anak negeri pihak ketiga apabila perayu bukan pihak dalam permohonan untuk memperolehi pengisytiharan status anak negeri pihak ketiga itu menurut s. 3(3) Ordinan di hadapan Mahkamah Anak Negeri dan (ii) sama ada responden pertama mempunyai bidang kuasa untuk menangani permohonan semakan di bawah s. 3(3)
B Ordinan yang sama.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Aziz Rahim HMR (keputusan majoriti):

(1) Pertama sekali, mahkamah harus menggunapakai prinsip asas untuk pentafsiran statut iaitu dengan memberikan perkataan dalam statut
C makna yang nyata dan biasa dengan niat untuk meningkatkan tujuan statut seperti yang dibayangkan di bawah s. 17A Akta Tafsiran 1948 dan 1967. Dari bacaan tajuk panjang Ordinan, Ordinan adalah dibuat bagi tujuan menyediakan tafsiran yang lebih tepat berkenaan pernyataan 'native' di bawah mana-mana undang-undang bertulis yang boleh
D digunapakai di Negeri Sabah yang berkuat kuasa pada permulaan Ordinan ini. Jika pernyataan 'native' wujud dalam bentuk undang-undang bertulis berkuatkuasa pada permulaan atau mula berkuatkuasa selepas permulaan Ordinan, maka untuk menentukan sama ada seseorang yang mengaku sebagai anak negeri dari segi fakta adalah anak
E negeri Sabah, pendekatan harus dibuat kepada peruntukan-peruntukan Ordinan khususnya ss. 2 dan 3.

(2) Adalah tidak benar untuk menyatakan bahawa s. 3(1), (2) dan (3) Ordinan saling berkaitan antara satu sama lain yang membolehkannya ditakrifkan sebagai 'nesting provisions' kerana peruntukan-peruntukan
F sebelum ini dibuat tertakluk kepada peruntukan kemudiannya. Subseksyen-subseksyen tersebut adalah saling berkaitan; tetapi, penerang 'subject to the provision of sub-s. (3) of this section ...' dalam sub-s. (2) hanya berkait dengan sub-s. (3) berhubungan dengan pengkhususan bidang kuasa Mahkamah Anak Negeri untuk menangani
G dan memutuskan permohonan pengisytiharan berkenaan status anak negeri pemohon. Melalui penerang ini, bidang kuasa eksklusif Mahkamah Anak Negeri berkenaan permohonan itu tidak bermaksud muktamad dalam penentuannya. Subseksyen (3) memperuntukkan bahawa perlaksanaan bidang kuasa adalah '... subject to review and
H scrutiny by, and appeal to the District Officer or Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri for the purpose'.

(3) Susunan kata yang terdapat dalam s. 3(3) Ordinan bermula dengan pernyataan "Any declaration of any Native Court ...". Tiada penerang dalam sub-s. (3). Subseksyen itu tidak membataskan hanya pada
I pemohon atau pihak yang terkilan di hadapan Mahkamah Anak Negeri atau Lembaga Pegawai sebelum semakan atau penelitian boleh dilakukan oleh Pegawai Daerah atau Lembaga Pegawai. Dalam

subseksyen, selepas pernyataan "subject to review and scrutiny by" terdapat tanda koma diikuti dengan pernyataan "an appeal to". Ini menunjukkan bahawa semakan dan penelitian pelaksanaan pengisytiharan boleh dibuat sama ada di hadapan Pegawai Daerah atau Lembaga Pegawai yang dilantik oleh Yang Di-Pertua Negeri bagi tujuan tersebut atas kerelaannya sendiri atau atas permohonan atau di hadapan pihak yang berkepentingan.

(4) Seksyen 3(3) Ordinan menggunakan pernyataan 'any declaration' sebagai pernyataan am. Frasa ini membawa pengertian yang luas. Jika ia bermaksud hanya berkenaan pemohon yang terkilan, ia akan diungkapkan sebagai 'any declaration adverse to the applicant' kerana itu mungkin akan menjadi satu-satunya keadaan di mana pengisytiharan yang dibuat oleh responden pertama mungkin dibantah. Tetapi, dengan menggunakan frasa tersebut, iaitu, 'any declaration', ia harus termasuk, apa-apa pengisytiharan yang mungkin tidak membawa padah kepada pemohon tetapi membawa padah kepada pihak ketiga yang bukan terlibat dalam permohonan, tetapi mempunyai kepentingan dalam status pemohon diisytiharkan sebagai anak negeri. Penggunaan frasa tersebut telah membuka pintu kepada pihak ketiga, seperti perayu-perayu di sini, untuk dibenarkan dan didengar berkenaan rasa tidak puas hati mereka yang berbangkit daripada pengisytiharan responden ketiga sebagai anak negeri Sabah.

(5) Alasan di sebalik penolakan permohonan perayu oleh responden pertama, atas asas bahawa ia tidak mempunyai kuasa untuk mendengar permohonan tersebut kerana ia telah membaca frasa, 'Any person claiming to be a native ...' dalam s. 3(1) Ordinan bersama dengan s. 3(3) Ordinan dan memutuskan bahawa orang yang menjadi perkara semakan atau penelitian di bawah s. 3(3) semestinya orang yang mengaku sebagai anak negeri di bawah sub-s. (1), adalah cacat. Tidak terdapat apa-apa dalam s. 3(1) dan s. 3(3) Ordinan yang mewajarkan pembacaan sebegitu berkenaan kedua-dua peruntukan itu. Pemohon yang tidak berjaya di bawah sub-s. (1) akan, dalam segala keadaan, merayu kepada Pegawai Daerah atau Lembaga Pegawai terhadap keengganan Mahkamah Anak Negeri membenarkan pengisytiharan daripada bergantung kepada kuasa semakan atau pengkajian semula atau penelitian Pegawai Daerah atau Lembaga Pegawai.

(6) Menggunapakai prinsip bagi ujian yang digunakan berkenaan isu *locus standi* seperti yang dikemukakan oleh Mahkamah Persekutuan dalam *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor*, atas dasar fakta matriks aduan perayu di Mahkamah Tinggi dan surat-suratnya kepada responden pertama, perayu mempunyai kepentingan yang sebenar dan tulen dalam hal perkara iaitu pengisytiharan status anak negeri responden ketiga.

Oleh Rohana Yusuf HMR (menentang):

(1) Skim dan struktur s. 3 Ordinan secara keseluruhannya, dalam erti dan maksud serta bahasa yang biasa tidak boleh menyebabkan s. 3(3) diperluaskan untuk memasukkan orang lain selain daripada pemohon sendiri. Bahasa peruntukan itu sendiri dibaca 'any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by sub-s. (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of Officers appointed by the Yang Di Pertua Negeri for the purpose'. Orang yang boleh terkilan oleh keputusan Mahkamah Anak Negeri menurut s. 3(1) adalah pemohon. Adalah mustahil untuk menyatakan bahawa orang lain akan terkilan dengan keputusan Mahkamah Anak Negeri dalam skim s. 3. Oleh itu, pihak ketiga seperti perayu di sini tidak boleh menggunakan s. 3(3) kerana keputusan di bawah s. 3(2) tidak menjejaskannya dalam apa-apa cara sekalipun.

(2) Tiada ruang bagi pihak ketiga untuk membuat rayuan di bawah s. 3(3) terhadap keputusan yang dibuat oleh Mahkamah Anak Negeri. Hak itu hanya terbuka kepada pemohon di hadapan Mahkamah Anak Negeri di bawah s. 3(1) yang pastinya adalah responden ketiga dalam konteks rayuan ini. Mahkamah tidak boleh membaca peruntukan ini dengan menambahkan orang lain selain daripada pemohon. Ini, tidak boleh ditambah oleh mahkamah, apabila penggubal tidak berhasrat untuk menambah. Ia bukan tanggungjawab mahkamah untuk mentafsir undang-undang yang tidak diniatkan oleh badan Perundangan.

(3) Seksyen s. 3(3) hendaklah ditafsirkan dengan erti nyata dan biasa dan tidak patut dikelirukan dengan ujian 'adversely affected person'. Perkataan 'adversely affected person' tidak disebut dalam s. 3(3). Oleh itu, ujian 'adversely affected person' bagi menentukan *locus* untuk semakan kehakiman tidak terpakai. Responden pertama dengan itu telah mentafsirkan s. 3(3) Ordinan dengan betul. Keputusan responden pertama dengan itu bukanlah tidak rasional atau mengalami *Wednesbury* unreasonableness. Tiada alasan yang kukuh untuk keputusan responden pertama dipersoalkan.

Case(s) referred to:

Ahli-Ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato Sri Ahmad Fairuz Dato' Sheikh Abdul Halim (and 2 other appeals) [2012] 2 CLJ 805 FC ***(refd)***

Anwar Ibrahim v. PP [2014] 1 CLJ 289 FC ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***

Joseph Paulus Lantip v. Lian Kee Chu & Ors [2011] 6 CLJ 399 CA ***(refd)***

Lau Keen Fai v. Lim Ban Kay & Anor [2012] 1 CLJ 569 FC ***(refd)***
Magor and St Mellons RDC v. Newport Corpn [1952] AC 189 (HL) ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***
NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Shim Tshun Fatt v. PP [2001] 1 CLJ 154 HC ***(refd)***
Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2012] 1 CLJ 49 FC ***(refd)***
Vickers, Sons and Maxim, Ltd v. Evans [1910] AC 444 ***(refd)***
Yeo Peck Chie v. KS Gill & Co [1946] 1 LNS 35 PC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8, 153(2)
Interpretation Acts 1948 and 1967, s. 17A
Interpretation (Definition of Native) Ordinance (Sabah Cap. 64), ss. 2(1)(a), (b), (c), (d), (2), (3), 3(1), (2), (3), (4)
Native Courts Enactment 1992, s. 16
Official Secrets Act 1972, s. 2
Rules of the High Court 1980, O. 53 r. 4

For the appellant - David Fung (Mohd Syarulnizam Mohd Salleh with him); M/s Alex Pang & Co
For the 1st respondent - Dennis Tweening Rantau; M/s Martin Idang Rantau & Co
For the 2nd respondent - Juprin Wong Adamal; Senior State Counsel
For the 3rd respondent - Edwin Tsen; M/s Tan Pang Tsen & Co

[Editor's note: For the High Court judgment, please see Madlis Azid v. Board of Officers & Anor [2013] 5 CLJ 403.]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Rahim JCA:

[1] This is an appeal by the appellant who was the applicant before the High Court against the decision of YA David Wong Dak Wah J given at Kota Kinabalu High Court on 25 May 2012 dismissing the appellant's application for judicial review against the first respondent's decision dated 21 January 2012 which ruled that the first respondent has no power to review the Native Certificate issued to and held by the third respondent in this appeal.

[2] We heard the appeal on 19 May 2014 and 22 May 2014. We then adjourned the matter for deliberation. We have reached a decision; but it is a split decision. My learned brother Justice Abang Iskandar and I had agreed that this appeal be allowed. However, our learned sister Justice Rohana Yusuf holds a different view as stated in her dissenting judgment. We, the majority, now give our reasons for our decision.

A **[3]** To be noted is that the third respondent is neither a party to the Judicial Review No. BKI-13JR-5/2 (the subject matter of this appeal before the High Court at Kota Kinabalu) nor a party in the proceeding before the first respondent's under s. 3(3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap 64) ("the Ordinance").

B **[4]** However, in the judicial review proceedings before the High Court, the third respondent was served with the cause papers and opportunity was given to the third respondent's counsel to tender his submissions on the applicant's/appellant's application for judicial review.

C **[5]** The background facts to the judicial review before the High Court and also the review before the first respondent under s. 3(3) of the Ordinance are as follows.

[6] By a suit (S-21-62-2009), the appellant and 97 others had sued Chua (the third respondent) in respect of a dispute as to the ownership of various
D parcels of native title land totalling 395.62 acres at Sungai Sugut, Labuk, Sabah (Native Lands). The legal basis of the suit was grounded on misrepresentation, *non-est factum* and inequality of bargaining power. During the trial of that suit, the third respondent had relied on his Native Certificate (which declared that he is a native) to entitle him to own the
E Native Lands. Learned counsel for the appellant informed the court that in view of undisputed case law, (see *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101 and *Joseph Paulus Lantip v. Lian Kee Chu & Ors* [2011] 6 CLJ 399), the appellant could not challenge the authenticity of the third respondent's Native Certificate in that suit itself and his only revenue was to seek a review before
F the first respondent.

[7] The appellant had referred to the first respondent his complaint to have the Native Certificate issued to and held by the third respondent reviewed under s. 3(3) of the Ordinance *vide* a letter dated 16 March 2011.
G The gist of the complaint was that the Native Certificate issued to and held by the third respondent was either forged or did not exist at all. In his letter the appellant cited correspondences from various public and private sources purportedly stating that the Native Certificate in the possession of the third respondent did not exist as it was never issued by the relevant Native Court, namely, the Native Court of Beluran.

H **[8]** The appellant alleged that the third respondent's Native Certificate was "either forged or did not exist at all" because the third respondent's mother was not one "Mariamah binti Berahim" of Sino-Brunei descent as the third respondent had testified that both his parents are from China.

I **[9]** On 20 January 2012, the first respondent rejected the application by the appellant to review the status of the Native Certificate issued to the third respondent in this appeal.

[10] In its written decision delivered on 20 January 2012 in respect of the application for review by the appellant, the first respondent had stated the reasons for dismissing the application as follows:

> Upon careful reading of the wordings of section 3 subsection (3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap. 64) [the said Ordinance], it is the view of the Board that it has no power to revise or scrutinize the said complaint. For this very reason, the Board of Officers has deemed it appropriate not to hear any party as to do so would, in the opinion of the Board, be *ultra vires* the provisions of the said section 3(3) of the said Ordinance. The Board has no power to hear the said complaint by Mr. Madlis Bin Azid @ Aziz.
>
> Subsection (3) must be read together with subsection (1) of the said Ordinance. Subsection (1) begins with the phrase "Any person claiming to be a native ...".
>
> Therefore, it is the opinion of the Board that a person who is the subject of a revision or scrutiny must necessarily be the person claiming to be a native under subsection (1). Section 3 subsection (3) provides for procedures of appeal or revision in cases where a person whose application for a Native Certificate in the Native Court has been refused. In other words, subsection (3) is a revisionary or appellate process available to an applicant whose application has been dismissed by the Native Court. In the present complaint, with respect, the said Mr. Madlis Bin Azid @ Aziz is complaining that the Native Certificate which is in the possession of Chua Yong Kim does not exist for reasons explained in his letter. He is not complaining as an aggrieved applicant for a Native Certificate whose application has been refused or dismissed by the Native Court (of any District). Therefore, in the opinion of the Board, he was not the applicant referred to in subsection (1) of section 3 of the said Ordinance.

[11] In the judicial review proceedings before the High Court it was submitted for the appellant that to construe s. 3(3) of the Ordinance narrowly by limiting the class of people who are entitled to seek for review of the Native Certificate to only applicants for Native Certificate is irrational on ground of "*Wednesbury* unreasonableness". It was argued that the interpretation which the first respondent give to s. 3(3) of the Ordinance is so outrageous that it will result in absurdity.

[12] The appellant also argued before the High Court that his *locus standi* in the judicial review cannot be questioned as he is a native of Sabah and, he and 97 natives were involved in a court dispute concerning ownership of the native lands with the third respondent who had in his testimony in court relied on his Native Certificate to justify his ability to hold the native lands. Further, it was argued before the learned trial judge that, to sustain the first respondent's construction of the s. 3(3) of the Ordinance would mean that the appellant would be denied his right of access to justice which would infringe art. 8 of the Federal Constitution which states that "all persons are equal before the law and entitled to the equal protection of the law".

[13] In dealing with the judicial review application before him, the learned High Court Judge was of the view that the crux of the application is undisputedly the construction of s. 3 of the Ordinance. Section 3 is re-produced below:

> Powers of Native Courts
>
> 3. (1) Any person claiming to be a native may apply to a Native Court established under the Native Courts Enactment, 1992 [En. No. 3/1992] and having jurisdiction in the area in which such person resides to declare:
>
> (a) that such person is recognized by native law and custom as the parent or child, as the case may be, of any other person; or
>
> (b) that such person is a member of a native community, has so lived during any stated period, and while so living has borne a good character; or
>
> (c) that such person is a member of a people named in paragraphs (c) or (d) of subsection (1) of section 2; or
>
> (d) that a parent of such person is or was a member of a people named in paragraph (c) of subsection (1) of section 2 and living, or if deceased is buried or reputed to be buried, in Sabah.
>
> (2) Subject to the provision of subsection (3) of this section, any Native Court referred to in subsection (1) to whom an application is properly made under such a subsection shall have exclusive jurisdiction to entertain and determine any such application and to make such declaration as the case requires.
>
> (3) any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by subsection (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of Officers appointed by the Yang di-Pertua Negeri for the purpose.
>
> (4) The final decision on any application made under subsection (1) shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates.

[14] Applying the principle stated by Seah SCJ in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39, the learned judge held that in constructing any provision of a statute the court is not concerned with the policy of the statute. In other words, the court is not concerned with the consideration as to why the statute was introduced in the first place. The learned judge went on to say that the words employed by the legislature in a statute must be given their plain and natural meaning; if however the words used attract different meanings, then the court must adopt a purposive approach in interpreting or in the construction of a provision in a given statute. We have no quarrel with this principle. Indeed, our view is that in interpreting a statute, the court must have regard to the purpose of the statute (this is the purposive approach). And in doing so the court must give the words used in the statute their plain and ordinary meaning. We think it

is not correct to say that the purposive approach is resorted to only when, applying the plain and ordinary meaning to the words of a statute, it gives rise to different meanings.

[15] Having said that, we noted that the learned judge was also of the view that the sole purpose of the Ordinance is to provide mechanism to people who are qualified under the Ordinance to apply to a Native Court to have his status declared as a native of Sabah as defined in the same Ordinance. The learned judge further held that the Ordinance does not contain any specific provision for challenge by third party before or after the declaration of the native status. The learned judge disagreed with learned counsel for the appellant's suggestion that the court must read into s. 3(3) of the Ordinance to allow strangers or third party with interest to intervene in the application proceeding for native status. The reason for this is explained by the learned judge in his judgment as follows:

> ... if that was the intention of the legislators; they could have easily put the words 'subject to appeal for review by a party apart from the person claiming to be a native for native status' or similar words to that effect in section 3(3) of the Interpretation Ordinance. Established rules of construction prohibit the Court from inserting words into legislation. As stated earlier the Court's task is to interpret and not to legislate. Further one cannot ignore the fact that sections 3(1), 3(2) and 3(3) are interrelated to each other or in the words of the learned counsel for the 1st respondent, they are a series of 'nesting provisions'. As pointed out by learned counsel for the 1st respondent, each sub-section is made subject to the sub-section immediately preceding it. The style of drafting of this provision in my view leads to the natural conclusion that section 3(1) is the parent provision with section 3(2) and (3) as the offspring provision so to speak. It can be said that the Interpretation Ordinance was created by the legislators to ensure that qualified persons are not disenfranchised from their rights to be called as natives of Sabah and hence obtaining the protection and privilege accorded to them by Article 153(2) of the Federal Constitution.

[16] Therefore, the learned judge held that the natural inference is that under s. 3 of the Ordinance, the review or the appeal to the Board of Officers (the first respondent) could only refer to person who had failed to obtain a declaration as to his or her native status before the Native Court. The learned High Court Judge held further that those natives who were unsuccessful in their claim for native status would still have a remedy to right any incorrect decision of the Native Court by resorting to the provision of s. 16 of the Native Courts Enactment 1992 which gives a District Native Court a power of revision by calling and examine the records of proceedings of a Native Court in order to satisfy itself as "to the correctness, legality or propriety of any order recorded or passed and as to the regularity of any proceedings of such court". In his final analysis therefore, the learned judge concluded that the appellant does not have *locus standi* under s. 3(3) of the Ordinance.

[17] We are of the view that there are two primary issues in this appeal. The first issue is whether the appellant has the *locus standi* under s. 3(3) of the Ordinance to make the application to the first respondent to review a declaration made by a Native Court in exercising of its powers under the Native Courts Enactment 1992 (in particular s. 16) on the native status of a third party when the appellant is not a party to the application for the declaration of the native status of that third party pursuant to sub-s. 3 of the Ordinance before the Native Court. The second issue is whether the Board of Officers (ie the first respondent) has the jurisdiction to entertain such application for review under s. 3(3) of the same Ordinance.

[18] To address these issues we will start by looking at the scope of the Ordinance Cap 64 which came into force on 10 December 1989.

[19] To be noted, the short title to the Interpretation Ordinance is stated as "The Interpretation (Definition of Native) Ordinance". The long title is stated as "To define the expression 'native' in a more precise manner and to make certain consequential provision thereon". It is obvious therefore that the purpose of the Ordinance is to provide for a clear and precise definition of the expression 'native' and to provide for consequential provisions relating thereto. This purpose is made clearer by the provisions in s. 2(1) and (2) of the Ordinance. Section 2(1) of the Ordinance provides that wherever the word 'native' used as a substantive, occurs in any written law enforced at the commencement of the Ordinance or any written law coming into force after the commencement of the Ordinance, unless expressly otherwise enacted in the respective Ordinances or written law, shall have the meaning ascribed to it in one of the paras. (a), (b), (c), or (d) of the said s. 2(1).

[20] The definition of expression "native" under paras. (a), (b), (c) or (d) is further clarified by s. 2(2) of the Ordinance. However, to rely on the definition of 'native' given under sub-s. (1) (b), (c) and (d) and sub-s. (2) of s. 2 of the Ordinance is not sufficient to give recognition to any person as a native of Sabah. This is because section 2(3) of the same Ordinance provides that no claim by any person to be a native by virtue of the provisions of paras. (b), (c) and (d) of s. 2(1) of the Ordinance shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under s. 3 of the Ordinance.

[21] At this point it is pertinent to note that under para. (a) of s. 2(1) of the Ordinance, a person whose parent are or were members of a people indigenous to Sabah does not require a declaration of his or her status as native by a Native Court for such person to be recognised as native of Sabah. But, for a person claiming to be native of Sabah under paras. (b), (c) and (d) of s. 2(1) of the Ordinance, a declaration by a Native Court as to the person's native status is required for purposes of a valid recognition of such status. It is also to be noted that one of the criteria for a person to claim that he or she is native of Sabah under paras. (b), (c) and (d) of s. 2(1) of the Ordinance, such person must ordinarily be resident in Sabah.

[22] It is settled law that on the authorities cited earlier in this judgment that the Native Court shall have exclusive jurisdiction to entertain and determine an application for declaration of a native status made to it by any person. However, that exclusive jurisdiction is qualified by sub-ss. (2) and (3) of s. 3 of the Ordinance. Subsection (2) reads "subject to sub-s. (3) of this section (ie, s. 3) ... any Native Court ... shall have exclusive jurisdiction to entertain and determine any such application and to make such declaration ..." (the word in bracket is added for emphasis). Subsection (3) provides 'any declaration of any Native Court made in exercise of jurisdiction confer upon it by s. 2 shall be subject to review by, an appeal to the District Officer or a Board of Officers appointed by Yang Di-Pertua Negeri for that purpose".

[23] It is also pertinent to note that sub-s. (4) of s. 3 of the Ordinance is couched in the following words:

> (4) The final decision on any application made under subsection (1) shall be conclusive evidence for all purposes in respect of the mater or matters to which it relates.

Looking at the scheme of things in the Ordinance, it appears to us that the expression "final decision" in sub-s. (4) of the Ordinance quoted above, with regards to a declaration by a Native Court as to the native status of any person is only final and conclusive for all purposes related thereto after the declaration had been subject to a review or an appeal (if any) either to the District Officer or to a Board of Officers appointed by the Yang Di-Pertua Negeri for that purpose pursuant to s. 3(3) of the Ordinance.

[24] On this issue of finality as to the declaration of a native status by a Native Court in Sabah, we observed that in the Federal Court case of *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 10, Lee Hun Hoe CJ (Borneo) at p. 108 of the report whilst stating that the Native Court have the exclusive jurisdiction to entertain and determine an application for a declaration of a native status, also acknowledged that that declaration may be appealed against under s. 3(3) of the Ordinance as if it were proceeding or order of the court. However, in that case there was no appeal against the declaration which was in issue; so therefore the declaration in that case was final and binding pursuant to s. 3(4) of the Ordinance. We also observe that the court in that case did not consider the scope of s. 3(3) as to the issue of *locus standi* of an applicant or the jurisdiction of the first respondent.

[25] Now, we return to the question of interpretation and construction of a provision of statute. First, we state the general principle. The law reports are replete with cases on the principles of construction of statute. The general principle is that where the words used in the statute are clear and unambiguous then those words must be given their plain and ordinary meaning. In such cases there is no question of construction. It has been said

A that the basic task of the court is to give effect to the true meaning of what Parliament had intended. In *Lau Keen Fai v. Lim Ban Kay & Anor* [2012] 1 CLJ 569; [2012] 2 MLJ 8, Zulkefli CJ (Malaya) said as follows:

> It is to be stated here that the basic task of the court is to ascertain and give effect to the true meaning of what Parliament had intended on the
B provisions of the Act it had enacted (see the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 5 AMR 585). Where the words are clear and unambiguous, a court should give effect to the plain words. There is no question of construction (see the case of *Shivram Anand Shiroor v. Radhabai Shantram Kowshik & Anor* [1984] SCR (2) 750.

C

[26] In *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299, the Federal Court in emphasising the same principle had said that "it is not the function of the Court to rewrite the statute in a way in which it considers reasonable. In other words, the court is not entitled to read words into a provision of a statute". The court
D then went on to quote the following passage by Lord Loreburn LC in *Vickers, Sons and Maxim, Ltd v. Evans* [1910] AC 444:

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this house sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial
E construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for
F it is to be found within the four corners of the Act itself.

[27] In yet another case Mohd Ghazali FJ in delivering one of the judgments in *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173, had said that:

> A statute is the written will of the Legislature. It is the fundamental rule
G of interpretation of a statute that it should be expounded according to the intent of Parliament. Courts must use the literal rule where a clear meaning of a statute will allow it, ie. Interpret the statute literally, according to its ordinary plain meaning. In the event of the words of the statue being precise and unambiguous in themselves, it is only just necessary to expound those words in their natural and ordinary sense.

H

[28] Thus, from all the authorities cited above, it is the general principle of construction that where the words of a statute are not ambiguous, they must be given their plain and ordinary meaning and the court should not read any additional words or expressions into the statute in order to arrive or to
I give meanings to those words as the court thinks what it should be. However, one must also have regard to the provision of s. 17A of the Interpretation Acts 1948 and 1967 so as to achieve a harmonious construction amongst various provisions of a statute. Section 17A of the Interpretation Acts 1948 and 1967 provides:

17A. Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[29] We notice that in his judgment, the learned High Court Judge had not referred to s. 17A of the Interpretation Acts 1948 and 1967 as cited above, though His Lordship did mention that if the words of a statute are capable of more than one interpretation then the court must resort to the purposive approach in the construction of the relevant provisions of a statute that the court was asked to interpret. We take a different view. We are of the view that first and foremost the court must apply the basic principle as to the construction of statute that is to give the words of a statute their plain and ordinary meaning with the view of promoting the purpose of the statute as envisaged under s. 17A of the Interpretation Acts 1948 and 1967.

[30] In construing of s. 3 of the Ordinance, the learned High Court Judge held the view that the sole purpose of the Ordinance is to provide a mechanism to people who are qualified under the Ordinance to apply to a Native Court to have his status declared as a native of Sabah. The learned judge went further to state that the Ordinance does not contain any specific provisions for challenge by a third party before or after the declaration of the native status. The learned High Court Judge disagreed with the suggestion by the learned counsel for the appellant before him that s. 3(3) of the Ordinance allows strangers or third party with interest to intervene in the application proceeding for native status. The reasons given by His Lordship for disagreeing with this suggestion are firstly, he said that "if that was the intention of the legislators; they could have easily put the words 'subject to appeal for review by a party apart from the person claiming to be a native for native status' or similar words to that effect in s. 3(3) of the Interpretation Ordinance". And it is an established rule of construction that the court should not insert words into a legislation. In the words of learned judge the court task is "to interpret and not to legislate". The second reason given by the learned judge is that s. 3(1), (2) and (3) of the Ordinance are interrelated or to borrow the expression used by learned counsel for the first respondent, are a series of "nesting provisions". The argument for this proposition is that each of the subsection is made subject to the subsection immediately preceding it and the learned High Court Judge held that this "leads to the natural conclusion that s. 3(1) is the parent provision with s. 3(2) and (3) as the offspring provision so to speak". It is the view of the learned High Court Judge that the Ordinance "was created by the legislators to ensure that qualified persons are not disenfranchised from their rights to be called as natives of Sabah and hence obtaining the protection and privilege accorded to them by art. 153(2) of the Federal Constitution".

[31] In the result, the learned High Court Judge made two conclusions based on his analysis of s. 3 of the Ordinance. The first conclusion is that in his view, "the natural inference is that the review or appeal to the first respondent could only refer to the person who had failed to obtain native status before the Native Court". His Lordship's second conclusion is that for those who were successful in their claim for declaration of their natives status, such declaration could be called for revision by the District Native Court pursuant to its power of revision under s. 16 of the Native Courts Enactment 1992 for the purpose of satisfying itself as to the correctness, legality or propriety of any order recorded or passed and as to the regularity of any proceeding of a Native Court.

[32] Though we agree with the learned High Court Judge's statement on the law, that is, it is an established rule of construction that the court should not insert words into a legislation, we have a different view as to His Lordship's construction of s. 3 of the Ordinance as regard to the so called "nesting provisions" and the natural inference that only a person who was unsuccessful in obtaining a declaration as to his native status can apply for a review under s. 3(3) of the Ordinance either to a Native Court or to the Board of Officers and His Lordship's view as to the purpose of the Ordinance.

[33] Our reasons are as follows. Firstly, as to the purpose of the Ordinance, it is quite obvious from the reading of the long title of the Ordinance that the Ordinance was made for the purpose of providing a more precise definition of the expression "native" under any written law applicable to the State of Sabah in force at the commencement of the Ordinance (which was 10 December 1952) or any written law coming to force after the commencement of this Ordinance. There are only two exclusions from this statement of purpose. First, the interpretation of the expression "native" in the Ordinance does not apply to the Ordinances set out in the Schedule to the Ordinance. Secondly, it does not apply to any expression of "native" if such expression has been given an express definition or meaning in the written laws which either in force at the time of the commencement or that come into force after the commencement of the Ordinance. What this means in our view is that if the expression "native" appears in any written law in force at the commencement or that comes into force after the commencement of the Ordinance, then in order to ascertain whether a person claiming to be a native is in fact a native of Sabah, resort must be made to the provisions of the Ordinance in particular ss. 2 and 3. If the person claims that he is a native by virtue of para. (a) of s. 2(1) of the Ordinance, such person must show that both of his parents are or were members of a people indigenous to Sabah. If a person claims he is a native by virtue of para. (b), (c) and (d) of s. 2(1) of the Ordinance, such person must show that he had met all the requirements of the relevant paragraphs of that sub-s. (1). In addition to that,

and to have his or her claim valid, such person would be required to have a declaration made by a Native Court pursuant to an application made under s. 3(1) of the Ordinance that he or she is a native.

[34] Secondly, we do not think that it is quite correct to say that sub-ss. (1), (2) and (3) of s. 3 of the Ordinance are interrelated in such a manner that it can be termed as a "nesting provisions" because the earlier provisions were made subject to the later provisions. The subsections are interrelated no doubt; however the qualifier "subject to the provision of sub-s. (3) of this section, ..." in sub-s. (2) only relates to sub-s. (3) in respect of the exclusivity of the jurisdiction of a Native Court to entertain and determine at the application for a declaration as to the native status of an applicant. By this qualifier it seems to us that the exclusive jurisdiction of a Native Court in respect of such application does not mean finality in its determination. This is because sub-s. (3) provides that the exercise of the jurisdiction is "... subject to review and scrutiny by, and appeal to the District Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri for the purpose".

[35] Thirdly, the wording of sub-s. (3) of s. 3 of the Ordinance starts with the expression "Any declaration of any Native Court ...". There is no qualifier in sub-s. (3). For example, the subsection does not confine itself to the applicant or an aggrieved party before the Native Court or the Board of Officers before a review and scrutiny can be done by the District Officer or a Board of Officers. It is also pertinent to note that in the subsection, after the expression "subject to review and scrutiny by" there is a comma then followed by the expression "an appeal to". This, in our mind shows that the review and the scrutiny of the exercise of any declaration can be made either at the instant of the District Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri for the purpose on its own volition or on an application or at the instant of any interested party.

[36] It is pertinent to note that s. 3(3) of the Ordinance uses the expression "any declaration" as a general expression. To our minds, this phrase imports a wide meaning. If what was meant that it only concerns the aggrieved applicant, then it would have been couched as "any declaration adverse to the applicant" because that would probably be the only situation where a declaration made by the first respondent may be challenged. We cannot think of any other declaration which may be challenged by the applicant as regards the outcome of his application to be recognised as a native of Sabah.

[37] But, by employing the phrase as it did, to wit "any declaration", that must include, any declaration which may not be adverse against the applicant but it may be adverse to third parties who may not be parties in the application, but who may however have interest in the status of the applicant declared as a native.

[38] The choice of such phrase, to our minds, has opened the door for third parties with real interests, such as the appellants here, to be allowed in and be heard about their grievance arising out of the declaration of the third respondent as native of Sabah.

[39] The subsection does not contain any expression such as "an aggrieved person or party" or such similar words or expression in relation to the expression "any declaration". This manner of drafting s. 3(3) of the Ordinance certainly does not support the conclusion reached by the learned High Court Judge in His Lordship's construction of s. 3 of the Ordinance. A plain reading of s. 3(1) of the Ordinance would seem to suggest that an application to a Native Court for declaration of a native status of Sabah may be made *ex-parte*. There is nothing in the section or for that matter in the Ordinance itself that requires an applicant to serve his or her application for such declaration on any party. Section 3(3) of the Ordinance is also silent as to the party or person who may seek a review of the declaration made by a Native Court under s. 3(2) of the Ordinance to a District Officer or Board of Officers appointed by the Yang Di-Pertua Negeri for that purpose. In this regard, we are also of the view that the reasoning by the first respondent, in rejecting the appellant's application on the ground that it has no power to hear the application because it had read the phrase "Any person claiming to be a native ..." in s. 3(1) of the Ordinance together with s. 3(3) of the same Ordinance and conclude that the person who is the subject of a revision or scrutiny under s. 3(3) must necessarily be the person claiming to be a native under sub-s. (1) is flawed. We say so because we find nothing in ss. 3(1) and 3(3) of the Ordinance that warrants such reading of the two provisions. Further, we are of the view that an unsuccessful applicant under sub-s. (1) would, in all circumstances be able to appeal to a District Officer or Board of Officers against the refusal of a Native Court to grant the declaration instead of relying on the power of review or revision or scrutiny of the District Officer or the Board of Officers.

[40] However, with regard to the appeal in respect of any declaration made by the Native Court, the appeal would, in our opinion necessarily be confined to the applicant and the respondent before the Native Court. We say so because it is common sense that an appeal must be, as a general rule, made by the parties who are aggrieved by the decision of the Native Court in respect of the declaration made by it under sub-s. (2) of s. 3 of the Ordinance.

[41] At this juncture, we would refer to the Federal Court case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, where the court had ruled that in order for an applicant to have *locus standi* to file for a judicial review, the applicant had to show he had a real and genuine interest in the subject matter. In that case the Federal Court had to deal with the issue of *locus standi* in respect of the Malaysian Trade Union Congress (MTUC) as an applicant to have access

to a copy of concession agreement and the audit report justifying 15% increase in water tariff. MTUC had earlier applied to the Minister in charge of power, water and communication to have a copy of the two documents in the light of Syabas' (the water concessioner in Federal Territory and Selangor) application for an increase of the water tariff by 15% and the approval by the Minister of that application. The Minister refused the MTUC the rights to have access to the two documents. MTUC with 13 others then filed an application for judicial review of the Minister's decision refusing them access to the two documents, seeking an order of *certiorari* to quash the Minister's decision and for an order of *mandamus* directing the Minister to disclose the two documents. At the High Court, the judicial review was allowed. One of the reasons was that the High Court found that the appellant in that case have *locus standi* to bring the action, the appellant being paying water consumers in the area covered by the concession agreement. On appeal to the Court of Appeal by the respondent, the Court of Appeal by majority allowed the appeal on the ground that though MTUC had satisfied the test of threshold *locus standi*, the second to 14th appellant had not satisfied the test. The appellant then appealed against the Court of Appeal's decision to the Federal Court; and the Federal Court speaking through the judgment of Hasan Lah FCJ dismissed the appeal on the ground that the audit report was an official secret document for the purposes of s. 2 of the Official Secrets Act 1972 and the two documents cannot be disclosed by the Minister to a third party without the agreement of the other parties to the concession agreement by virtue of cl. 45 of the concession agreement. However, on the issue of *locus standi* the Federal Court found for the appellant MTUC because MTUC had shown a real and genuine interest in the subject matter.

[42] In our present case the facts as found in the suit S-21-62-2009, the applicant and 97 others had sued the third respondent in respect of a dispute as to the ownership of various parcels of native title land totalling 395.62 acres at Sungai Sugut, Labuk, Sabah ('native lands'). The legal basis of the suit was grounded on misrepresentation, *non-est factum* and inequality of bargaining power. During the trial of that suit, the third respondent had relied on his Native Certificate (which declared that he is a native) to entitle him to own the native lands. Then, in his letter of complaint dated 16 March 2011 to the Board of Officers, the appellant had complained amongst others that the Native Certificate issued to and held by the third respondent was either forged or did not exist at all. The appellant cited in his letter correspondences from various public and private sources purportedly stating that the Native Certificate in the possession of the third respondent did not exist as it was never issued by the relevant Native Court, namely, the Native Court of Beluran. Applying the principle as to the test to be applied in respect of the issue as to *locus standi* as propounded by the Federal Court in *Malaysian Trade Union Congress & Ors* (*supra*), it is obvious on the factual matrix of the applicant's complaint in the High Court in suit S-21-62-2009 and his letters

to the Board of Officers, (ie, the first respondent), the appellant had a real and genuine interest in the subject matter *to wit* the declaration as to the native status of the third respondent.

[43] On the above reasons, we are of the opinion that the two issues identified earlier in this judgment which require our determination must be answered in the affirmative. Accordingly, we will allow the appeal with costs.

Rohana Yusuf JCA (dissenting):

[44] The appellant, Madlis bin Azid @ Aziz, was earlier a litigant in a civil suit before the High Court at Sandakan *vide* Suit No. S-21-62-2009 against one, Chua Yong Kim (Chua). In that civil suit the appellant and 97 others filed a claim against Chua over a dispute in the ownership of native lands totalling 395.62 acres situated at Sungai Sugut, Labuk, Sabah (native lands). In that suit, Chua, in reliance on a Native Certificate issued by the Native Court, maintained that he is a Native and is therefore entitled to stake his claim over the native lands.

[45] At all material times, the appellant was mindful of the various decided cases that affirmed the exclusiveness of the Native Court's power to declare any person a Native. This exclusive power is granted pursuant to s. 3 of the Interpretation (Definition of Native) Ordinance ('Cap 64'). The appellant then sought to challenge the status of Chua as a native granted by the Native Court , before the Board of Officers (the board) pursuant to s. 3(3) of Cap 64. Under s. 3(3) the board is empowered to review the decision of the Native Court made under s. 3(1) of Cap 64. The appellant's application was accordingly rejected by the board.

[46] The decision of the Board was made on 20 January 2012. The board's decision was premised on the interpretation of s. 3(3) of Cap 64. In essence the Board was of the view that under that section, the application to appeal, review or to scrutinise Chua's Native Certificate was not opened to the appellant. It follows therefore that only if Chua, as the applicant for a declaration as a native, had been aggrieved that he may do so under s. 3(3) but not the appellant. In other words, only an applicant under s. 3(1) who is a party to the proceedings before the Native Court may make application to appeal, review or scrutinise the Native Certificate before the board. The decision of the board is found at pp. 135-138 of vol. 2 part C of the appeal records.

[47] The appellant sought to obtain a redress against the decision of the board by way of a judicial review under O. 53 of the Rules of the High Court 1980 ('RHC'). His application was made on 2 February 2012 as found of pp. 37–38 of vol. 1 part A of the appeal records. Though Chua was not cited as a party to the judicial review application, the same was served on him. At the stage where leave was considered, leave to submit before the court on

the application for judicial review was granted to Chua's counsel. After hearing submissions by all parties, the learned High Court Judge dismissed the appellant's application for judicial review. The learned High Court Judge agreed that no error was committed by the board in deciding that s. 3(3) was not opened to the appellant. It was only opened to the applicant under s. 3(1). The appellant appealed against the decision of the high court, in the present appeal before us.

[48] In his application for judicial review before the High Court, the appellant states that the board had acted unreasonably, irrationally and unlawfully in dismissing the application because the board failed to consider the merits of the application listed in para. 4(b) of his application. The full grounds cited in that paragraph are these:

(i) The Declaration of Native of Chua Yong Kim was wrongfully given as Chua Yong Kim was always of Chinese descent and had no purported native mother named Puan Marimah binti Berahim;

(ii) Chua Yong Kim had given sworn testimony in Court confirming that he is Chinese and thus had no native blood in obtaining the Declaration of Native;

(iii) Mr Awang bin Pakar had given a sworn testimony in Court that his mother of birth was Puan Marimah binti Berahim;

(iv) The 1st Respondent had misunderstood the basis of the Applicant's application which was about the status of Chua Yong Kim a non native and not whether the Declaration of Native had existed or not;

(v) Chua Yong Kim has blatantly abused the Declaration of Native to justify his ownership of Native lands;

(vi) It would be grossly unreasonable, irrational and unlawful to take an interpretation of s 3 (3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap 64) so as to disentitle the Applicant from applying to review the Declaration of Native;

(vii) The fact that Chua Yong Kim was and is not a non-native was a fundamental issue of importance that should have warranted a thorough review and scrutiny of the Declaration of Native.

[49] In my view, the grounds of application cited above are of no relevance to this appeal. There is no doubt the board did not consider the merits of the appellant's application for review. This is because according to the board, under s. 3(3) the appellant was not entitled to apply for a revision of the decision of the Native Court to the board on a certificate issued to Chua.

[50] This appeal rests on one sole issue, that is, whether the decision of the board to deny the appellant application to review the decision of the Native Court for the reason that s. 3(3) does not permit appeal by any other person other than the applicant under s. 3(1), was correct in law.

[51] What is before us in this appeal is therefore whether the board had correctly construed s. 3(3) of Cap 64 in denying the appellant the right under s. 3(3) of Cap 64. In determining this issue it would fall squarely on the true construction of that section.

[52] It must be borne in mind that the interpretation of s. 3(3) must be construed in its plain and ordinary meaning and it must not be confused with the test of "adversely affected person" as submitted by learned counsel for the appellant. The word "adversely affected person" is not mentioned in s. 3(3) and cases on *locus standi* applying such test is therefore of no consequence.

[53] I now come to the construction of s. 3(3) of Cap 64. In construing this provision, I agree with the approach taken by the learned High Court Judge following the cardinal rule of interpretation that a statute must first be given its plain and ordinary meaning. Unless the words give rise to a different meaning then a purposive approach would have to be adopted. I would also add that a statute must be read and construed as a whole and not to be taken in isolation. (see *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685; *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385; *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69; *Yeo Peck Chie v. KS Gill & Co* [1946] 1 LNS 35; [1946] 1 MLJ 131; *Magor and St Mellons RDC v. Newport Corpn* [1952] AC 189 (HL)).

[54] Upon my examination of s. 3 of Cap 64, I agree with the finding by the learned trial judge that s. 3 was enacted with a sole objective of laying down the process or mechanism of how a person may apply to be declared a native. Under s. 3(1) the Native Court is empowered to declare a person to be a native:

> (a) that such person is recognised by native law and custom as the parent or child, as the case may be. of any other person; or
>
> (b) that such person is a member of a native community, has so lived during any stated period, while so living has borne a good character; or
>
> (c) that a parent of such person is or was a member of a people named in paragraph (c) of subsection (1) of section 2 and living, or if deceased is buried or reputed to be buried in Sabah.

[55] Section 3(2) confers exclusive jurisdiction to Native Court to entertain and determine an application made under s. 3(1) of Cap 64, but it is subjected to s. 3(3). Under s. 3(3) the District Officer or the Board of Officers can review, scrutinise or determine an appeal on a declaration made under s. 3(2). The language used in s. 3 shows a process which enables a person to apply to be declared a native, followed by section in s. 3(2) which gives exclusive power to the Native Court to make that declaration subject to review, scrutiny or appeal under s. 3(3). It flows from this provision that an applicant aggrieved by the decision of the Native Court under s. 3(1) can

invoke s. 3(3) to lodge a complaint to the board. It is axiomatic then that the person who could be aggrieved by the Native Court's decision made under s. 3(2) must therefore be an applicant who may have been denied a declaration, or in some way aggrieved by the decision of the Native Court.

[56] The scheme and structure of s. 3 as a whole, in its plain and ordinary meaning and language cannot cause s. 3(3) to be expanded to include any other person other than the applicant himself. The language of the provision itself reads "any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by sub-s. (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri for the purpose". The only person who can be aggrieved by the decision of the Native Court pursuant to s. 3(1) would be the applicant. It is inconceivable to say that any other person would be aggrieved by the decision of the Native Court in the scheme of s. 3. Thus a third person like the appellant here cannot invoke s. 3(3) simply because the decision under s. 3(2) does not affect him in any way whatsoever. He is a stranger to the application for declaration by Chua.

[57] For illustration this provision can be compared with O. 53 r. 4 Rules of Court 2012, which states that "Any person who is adversely affected by the decision of any public authority shall be entitled to make application." In determining the adversely "affected person" under O. 53, there are ample case authorities that had decided on how a person can be adversely affected (see *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145; *Ahli-Ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato Sri Ahmad Fairuz Dato' Sheikh Abdul Halim (and 2 other appeals)* [2012] 2 CLJ 805; [2012] 2 MLRA 197). Whereas s. 3(3) is sequential to s. 3(1) and s. 3(2). It is not a provision that stands by itself but it is inextricably linked with one and the other and therefore must be read in context with the other subsections of s. 3 (see *Shim Tshun Fatt v. PP* [2001] 1 CLJ 154; [2001] 5 MLJ 40 and *Anwar Ibrahim v. PP* [2014] 1 CLJ 289; [2014] 1 MLJ 317).

[58] Thus, reading the provisions in context and as a whole, there is no room for a third person to lodge an appeal under s. 3(3) against the decision made by the Native Court. That right is only opened to the applicant before the Native Court under s. 3(1) which surely would have been Chua in the context of the present appeal. The court cannot read into this provision by adding into it, any other person than the applicant. This, the court cannot add, when the legislator does not intend to add. I agree with the learned High Court Judge that if the legislator intended so, it could easily put the words "subject to appeal for review by a party apart from the person claiming to be a native for native status or some similar words to that effect". It is not for the court to read into the law what is not intended by the legislature. I am guided by the decision of the Supreme Court through the judgment of

A the late George Seah SCJ in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987]1 MLJ 39, who reiterated in that case that, the constitutional function of the court is to interpret the law and to enforce it. Further he said, "The duty of the court and its only duty is to expound the language of the Act in accordance with settled rules of construction. The B court has nothing to do with the policy of the Act which it may be called upon to interpret." Guided by these principles, I am of the view that s. 3(3) is clear in its meaning and the only way to interpret s. 3(3) is to say that the right to review under that section refers only to the applicant under s. 3(1).

[59] Though in general, the option available to any person who claims to C have been "adversely affected" by a decision of a public authority is by way of judicial review, we are not here to deliberate on whether the appellant has such right. We are here to deliberate on the *locus* of the appellant or the right of the appellant to invoke s. 3(3) in applying for a review of a the decision of the Native Court in issuing the Native Certificate to Chua, to the board. D It is also for this reason that I am of the view that the test of "adversely affected person" to determine *locus* for a judicial review does not apply.

[60] Besides, the appellant himself was aware of numerous decisions that declaration by the Native Court under s. 3 Cap 64 is conclusive unless reviewed or appealed upon under s. 3(3). (see *Datuk Syed Kechik Syed* E *Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101, *Joseph Paulus Lantip v. Lian Kee Chu & Ors* [2011] 6 CLJ 399). However, in this judicial review application the appellant is not applying for a review of the Native Court's decision in issuing the Native Certificate to Chua. The appellant instead is appealing against the decision of the board to reject his F application to review the decision of the Native Court in issuing the certificate to Chua.

[61] Even for a moment, if it can be argued that an "adversely affected" test may be read into s. 3(3), the appellant has not demonstrated how he was affected especially when he and the 97 other plaintiffs in the suit S21-62-2009 G had their ownerships to their land already restored by the High Court of Sandakan on 23 December 2011. In this regard, I completely agree with the learned High Court Judge that the status of Chua is no longer a life issue and is merely academic.

[62] For the above reasons, I am of the view that the board or the first H respondent had correctly interpreted s. 3(3) of Cap 64. The decision of the board is therefore not irrational or suffers from *Wednesbury* unreasonableness. There is no good reason for the decision of the board to be impugned and hence I would dismiss the appeal of the appellant and uphold the decision of the learned trial judge.

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